Supreme Court, U.S.
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No. 91-1594

In The

Supreme Court of the United States

October Term, 1992

FRED H. EDENFIELD, et al.,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ Of Certiorari
To the United States Court Of Appeals
For The Eleventh Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the State of Florida's interest in maintaining standards among members of the licensed professions validly permits the prohibition of direct, in-person, uninvited solicitation of potential clients by licensed certified public accountants ("CPAs")?

2. Whether the State of Florida's prohibition of direct, in-person, uninvited solicitation of potential clients by licensed CPAs, enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is an unconstitutional restriction of a CPA's First Amendment right of commercial speech?

3. Whether a State's prohibition of direct, in-person, uninvited solicitation of potential clients by licensed CPAs, enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is a valid time, place and manner restriction of a CPA's First Amendment right of commercial speech?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States District Court were: Fred H. Edenfield, Jr.; Richard J. Aboud; Whipple Van Ness Jones, Jr.; Margaret F. Stroupe; Dean F. Denison; William R. Martin; Joseph R. Millsaps; Antonio L. Argiz; and Jerome A. Schine, Petitioners; and Scott Fane, Respondent.

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OPINIONS BELOW

The decision of the United States Court of Appeals, Eleventh Circuit, was rendered on October 30, 1991. *Fane v. Edenfield* is reported at 945 F.2d 1514 (11th Cir. 1991), and is reproduced herein in the Joint Appendix. (JA-86). A Suggestion for Rehearing En Banc was filed by Defendants-Appellants, and was denied on December 31, 1991. This Order is reproduced in the Joint Appendix. (JA-110).

The Order from the United States District Court, Northern District of Florida, was entered on September 13, 1990, and is reproduced in the Joint Appendix. (JA-78).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of a United States Court of Appeals on a writ of certiorari under Title 28 U.S.C. Section 1254(1). The decision of the Court of Appeals, Eleventh Circuit, was rendered on October 30, 1991, and on December 31, 1991, a Suggestion for Rehearing En Banc[2/] filed with the Court of Appeals was denied. Petitioners subsequently filed a Petition for Writ of Certiorari, which this Court granted on May 26, 1992.

2/ "A suggestion of rehearing *en banc* will also be treated as a petition for rehearing before the original panel." *See* 11th Cir. R. 35-6, and also *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 1662, 109 L.Ed.2d 31 (1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions are set forth in the Appendix.

STATEMENT OF THE CASE

The Petitioners include the State of Florida ("State") and the members of the Florida Board of Public Accountancy ("Board"). Respondent Scott Fane ("Fane") is a Florida certified public accountant ("CPA") who instituted a Section 42 U.S.C. 1983 Complaint in the Gainesville District of the Northern District of Florida in an effort to have Florida's prohibition of direct, in-person, uninvited solicitation by CPAs declared unconstitutional. (JA-1).[1/]

Rule 21A-24.002, F.A.C. (the "Rule"), prohibits the "direct, in-person, uninvited solicitation" of potential new clients.[2/] The Board adopted the Rule to further its legitimate interest in protecting the CPA's image of integrity, independence and objectivity, and to restrict attempts of overreaching or undue influence by regulating the manner in which such solicitation occurs. Uninvited written solicitation is not prohibited by the Rule.

Petitioners asserted the Rule furthers an important governmental interest. When the Florida Legislature enacted

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1/ Florida's regulations do not prohibit direct, in-person, *invited* solicitation, and the state's definition of "invited" is rather broad. For example, a general business discussion during a social gathering invites solicitation. (JA-22).

2/ Section 21A-24.002(2) provides "[a] licensee shall not by any direct in-person, uninvited solicitation solicit an engagement to perform public accounting services...[c] where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication. Section 21A-24.002(3) makes unlawful "any communication which directly or indirectly requests an immediate oral response from the recipient."

Chapter 473, Fla. Stat., regulating the practice of public accounting, it stated its purpose:

> The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

See § 473.301, Fla. Stat.

In order to protect the public perception of the CPA's total independence and objectivity, Florida has determined that direct, in-person, uninvited solicitation would be inappropriate as a method by which CPAs should become engaged to perform services for clients. (JA-20). The issue is thus whether Florida's restrictions on commercial speech, as embodied in the Rule, are constitutional in light of recent Court decisions upholding similar restrictions on attorney solicitation.

Fane alleges the Rule violates his First Amendment rights to commercial speech and limits his ability to compete with other established CPAs as well as with other unlicensed financial professionals such as non-certified accountants, bookkeepers and tax preparers, who are not subject to the Rule.

After stipulation by the parties, the Complaint was transferred to the Tallahassee Division of the U.S. District Court for the Northern District of Florida, and the named defendants were modified to include the members of the Board in their official capacities.

The Board answered the Complaint on October 6, 1988 (JA-7), and on December 8, 1988, Fane moved for Summary Judgment with an affidavit (JA-9). The Board responded to Fane's Motion on January 4, 1988 with an Affidavit (JA-16). Fane replied with a Supplementary Affidavit on January 27, 1989 (JA-25).

Fane argues the Rule is an unconstitutional restriction of his right to commercial speech because his potential clients are typically businessmen who are likely to be sophisticated, and it is unlikely a CPA would engage in any type of fraud, overreaching or other activities which might improperly influence a potential client or compromise the CPA's independence in performing public accounting functions (JA-13). In support of his argument, Fane points to the disciplinary provisions of the Florida Statutes and Rules governing public accounting as well as applicable criminal penalties as adequate restriction to deter CPAs from engaging in collusion or fraud with a potential client. (JA-14, 15). Fane further alleges the Rule denies his right to equal protection since, except for the attest function, i.e., audits or reviews (which he does not wish to perform), all activities of CPAs in the State of Florida may also be performed by non-licensed persons not subject to the Rule. (JA-4, 15).

The Board filed the affidavit of Louis W. Dooner, CPA ("Dooner"), in response to Fane's Motion for Summary Judgment.[3] According to Dooner, "[T]he auditor's independence

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[3] Dooner is a distinguished practitioner who has served the profession of public accounting by holding leadership positions in the Florida Institute of Certified Public Accountants and the AICPA, and has been a member of one of the bodies which set the technical standards of practice for CPAs. Dooner has also acted (continued...)

means that he is so free of his client that he is willing to report the facts as they are found regardless that it may be detrimental to the client. If he has solicited the client he will be beholden to him." (JA-19). Mr. Dooner stated:

> The audit function is too important to the economic well being of this country to allow it to be torn down by a few who want the prestige and public trust their predecessors have earned without being willing to continue to conduct themselves in a manner that will assure the continued integrity of opinions on financial statements. The ban on direct, in-person, uninvited solicitation is for the protection of users of financial statements. It is not to protect the public from solicitors. (JA-20).

According to Dooner, the Rule represents a reasonable restriction upon the manner, not content, of a CPA's solicitation, given that a state otherwise could not regulate such solicitation, and other alternative means of solicitation were available:

> The *only* type of solicitation that a CPA may not engage in is that *that places the potential client in the position of having to make an immediate oral response, thus opening the door to overreaching and vexatious conduct by the CPA, or conversely, and far more damaging to society, the opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached, since the CPA is obviously in need of business and may be willing to bend the rules. Such activity is not in the best interests of the*

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[3](...continued)
as a regulator of the CPA profession in the State of Florida, and is a past member and chairman of the Florida Board of Accountancy. (JA-1-2).

> *public which is so dependent on independent opinions on financial statements* based on an audit conducted in accordance with generally accepted auditing standards. (Emphasis supplied).

(JA-23).

After hearing oral argument on September 13, 1990, the District Court granted Fane's Motion for Summary Judgment and entered its Order enjoining the Board from enforcing the provisions of Rules 21A-24.002(2), (3) as they apply to CPAs who seek clients through direct, in-person, uninvited solicitation in the business context.

On October 11, 1990, the Board appealed that decision to the Eleventh Circuit Court of Appeals. On October 31, 1991, the Eleventh Circuit Court of Appeals entered its opinion affirming the District Court by a 2-1 vote. (JA-86). The Board filed a timely Suggestion for Rehearing En Banc, which was denied on December 31, 1991. (JA-110).

The Eleventh Circuit Court of Appeals' decision is contrary to a Florida Fourth District Court of Appeals' decision issued immediately before its decision, declaring the same prohibition on in-person, uninvited solicitation constitutional. *See State Dept. of Professional Regulation, Board of Accountancy v. Rampell*, 589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, No. 79,371. (Supreme Court of Florida, Feb. 17, 1992).

On March 30, 1992, the Board filed its Petition for Writ of Certiorari with this Court which was granted on May 26, 1992. This Brief on the Merits follows.

SUMMARY OF ARGUMENT

Florida has a legitimate, strong interest in licensing and regulating the practice of the learned professions within its borders. The Court of Appeals, in holding Florida's prohibition against direct, in-person, uninvited solicitation by licensed professionals to be unconstitutional, erroneously construed this Court's decision in *Ohralik v. Ohio State Bar Ass'n, infra,* as being limited to attorneys. The Court of Appeals disregarded this Court's decision in *U.S. v. Arthur Young, infra*, which recognizes that the public's perception of the independence and integrity of CPAs is the *sine qua non* of the profession, and that in many engagements, especially those involving tax services such as those Fane seeks to provide, a CPA is just as much involved in a desire to persuade a client to engage him as is an attorney. In short, the elements that led this Court in *Ohralik, infra*, to permit the State to prohibit categorically direct, in-person, uninvited solicitation of prospective clients by attorneys are present within the context of the accounting profession as to solicitations by CPAs.

This Court's holdings in *Ohralik, infra, Shapero, infra* and *Zauderer, infra,* address the inherent impossibility of regulating non-memorialized direct, in-person solicitation contacts. The prophylactic rule at issue forms the only practical barrier by which the State can attempt to regulate a practice which it legitimately deems to be a threat to the profession and its consuming public. Since the State bans only "cold call solicitation", and permits CPAs to engage in all other forms of non-fraudulent advertising, there are ample alternatives for a CPA to seek out prospective clients.

The Board's Rule prohibiting direct, in-person, uninvited solicitation by CPAs is thus a legitimate use of a state's authority to regulate a profession, and is facially constitutional. The Rule

satisfies the requirements set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, infra*. As prescribed in *Central Hudson*, a governmental regulation on commercial speech will be upheld if:

(1) It regulates commercial speech as defined by this Court;

(2) It promotes a substantial governmental interest;

(3) It directly advances that interest; and

(4) Commercial speech is burdened no more than necessary to promote the substantial governmental interest. *Id.*

Reasonable time, place and manner restrictions may be imposed by States where, as here, the restrictions are justified without regard to the content of the commercial speech, are narrowly tailored to serve that interest, and leave open ample alternative methods for communication. *Barnes v. Glen Theatre, Inc., infra*. The Court of Appeals erred here in holding the Rule was not a reasonable time, place and manner restriction.

The central question to validating a time, place and manner restriction is whether the Rule was enacted because the government disagrees with the content of the speech as opposed to only the time, place and manner of its dissemination. Florida does not prohibit any CPA from disseminating truthful information about his/her practice, including the solicitation of prospective clients, as long as the solicitation is memorialized. Thus, the Rule is concerned only with the manner of communication, not the content. Only by banning this manner of communication can the professionalism of CPAs be assured, especially in light of the impracticability of less onerous forms of regulation. The Rule is thus justified not based upon the content of the speech, but upon the conduct surrounding the speech and the secondary effects thereof, much as was noted by this Court in *Metromedia, Inc. v.*

City of San Diego, infra, and in *Ohralik, infra*; the banning of this type of professional solicitation is legitimate, whether under a full-fledged commercial speech, or a time, place and manner analysis.

ARGUMENT

I. The State Has A Special Responsibility For Maintaining Standards Among Members Of The Licensed Professions, and A Ban On Verbal Cold-Call Solicitation By CPAs Is Within The Permissible Scope of A State's Regulation.

Without question, the controlling case here is *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) ("*Ohralik*"), a case in which this Court affirmatively answered a part of the question reserved in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977) and held a state may constitutionally discipline a lawyer for soliciting clients in person. The only question before this Court, as well as the courts below, is the meaning of *Ohralik* as applied to CPAs. There are essentially two possible meanings, and whichever meaning is intended will control the decision today in this case:

1) The first possible meaning, which Petitioners believe the decision itself and subsequent interpretation of the case indicates to be its meaning, is that State agencies with authority to regulate the learned professions have the authority, at least when they give reasonable alternatives, to prohibit face-to-face[4/] uninvited

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[4/] The term "face-to-face" as used in this brief is intended to encompass any direct, personal communication, whether in person or over a telephone, the paradigm of which is the "cold call".

verbal solicitation of prospective clients. If this is the case, the agencies have the right to proscribe this type of solicitation in the name of the professional standards the State has required them to impose and whether or not the specific solicitation is or is not false, fraudulent, or otherwise subject to censure. In other words, the State is permitted to deal with the potential, as well as the actual harm, and may impose a "prophylactic device to halt a potentially misleading statement";[5/] or

2) The second possible meaning is to restrict *Ohralik* to the most negative interpretation of its facts, and assume that Ohio's censure of the face-to-face, uninvited (at least as to one of the clients of Ohralik described in the *Ohralik* opinion) verbal solicitation was honored only because of those facts and the peculiar abilities of attorneys to advocate, distort, and overbear reasoned judgment.

If the correct reading of *Ohralik* is the latter, then one is hard pressed to hypothesize in the average CPA an equivalent ability to advocate, distort and overbear reasoned judgment, and the facial challenge to the constitutionality of the Board's prohibition of face-to-face uninvited solicitation which the District Court and Court of Appeals sanctioned should probably be sanctioned again by this Court. But if the correct reading of *Ohralik* is the former, then both the District Court and the Court of Appeals erred, and this Court should reverse and approve the Board's Rule prohibiting such solicitation.

[5/] "The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs." *Ohralik, supra*, at 436 U.S. 464, 98 S.Ct. 1923, 56 L.Ed.2d 458-59.

Ohralik involved a request for review of the determination of the Ohio Supreme Court that the Ohio State Bar Association could disbar one of its members for face-to-face uninvited verbal solicitation. The solicitation involved the successful effort by Ohralik to represent two 18-year-old individuals involved in a motor vehicle accident caused by a third party. The solicitation of the first individual occurred in the hospital while she was in traction, and the solicitation of the second individual occurred just after she was released from the hospital. The possibility existed that the interests of the victims were in conflict and, in fact, Ohralik had given conflicting advice to the two of them (or their representatives).

The Ohio Supreme Court, however, did not focus on any of these "special" facts in determining the lawyer should be disbarred. Nor did the question presented by either Ohralik or the Ohio State Bar Association focus on such "special" facts. Rather, both presented the question dispassionately as to the right of the State to prohibit face-to-face uninvited professional solicitation. This Court likewise appeared to focus on that question, rather than the "special" facts. *Ohralik, supra*, at 436 U.S. 449, 98 S.Ct. 1915. Subsequent decisions of this Court also appear to say that *Ohralik* permitted a State professional licensing agency to prohibit any face-to-face uninvited personal solicitation by any attorney for any purpose. *See, e.g, Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990).

These appear to be the salient conclusions that can be drawn from *Ohralik*, as construed by subsequent decisions of this

Court, as well as the prior non-commercial speech decisions of this Court which preceded *Ohralik*:

> (i) States have a right to a genuine concern about the policing of learned professions,[6] i.e., professions for which the State has set up a licensing scheme, including testing for competence to perform that profession's work and the establishment of standards of performance and conduct.[7]

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[6] While the Court in *Bates* determined that truthful, restrained advertising of the prices of 'routine' legal services would not have an adverse affect on the professionalism of lawyers, this was only because it found 'the postulated connection between advertising and the erosion of *true professionalism* to be severely strained.' 433 U.S., at 368, 97 S.Ct. at 2691, 53 L.Ed.2d 810. . . . The *Bates* Court did not question a state's interest in maintaining high standards among licensed professionals. Indeed to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of 'true professionalism.' [Emphasis original in *Ohralik*]

Ohralik, 436 U.S. at 460-61, 98 S.Ct. 1921, 56 L.Ed.2d 456.

[7] *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572, 588 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad powers to establish standards for licensing practitioners and regulating the practice of professions"); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

> (ii) Solicitation by a learned profession is simply one form of advertising. All advertising is commercial speech, which, although certainly entitled to First Amendment protection,[8] is subject to regulation by government to a far greater degree than political and other forms of non-commercial speech.
>
> (iii) Solicitation by a learned profession, and other forms of advertising which are in writing, are subject to content review after the fact. Therefore, to the extent there is a concern about whether that content is fraudulent or otherwise misleading, the solicitor may be disciplined after the fact for that conduct. That being the case, the state regulator generally[9] is limited to after-the-fact review

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[8] To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. *Ohralik*, 436 U.S. at 456, 98 S.Ct. at 1918.

[9] Other forms of limitation are also acceptable, as the Court noted in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506, 101 S.Ct. 2882, 2891-92, 69 L.Ed.2d 800, 813-14 (1981) (validating governmental power to ban commercial off-site billboards, while invalidating an ordinance that prohibited noncommercial billboards as well):

> [C]ommercial and noncommercial communications, in the context of the First Amendment, have been treated differently. *Bates*

(continued...)

thereof, and appropriate sanctioning for misconduct in its use.

(iv) Verbal solicitation is essentially unregulatable because there is no simple way to determine what was said. Therefore, a state regulator is permitted to simply prohibit all verbal, uninvited[10/] face-to-face solicitation. Certainly after-the-fact review is limited to hearing testimony of the speaker and the person spoken to. This is hardly simple and only in the rare case will the parties to the speech agree

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[9/](...continued)
v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), held that advertising by attorneys may not be subject to blanket suppression and that the specific advertisement at issue there was constitutionally protected. However, we continue to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be. *Id.* at 379-381, 383-84, 97 S.Ct., at 2706-09.

The general right to limit certain forms of commercial speech for good reason, such as was the case in *Metromedia*, would apply to written speech by a member of a learned profession as simply one form of commercial speech.

[10/] In *Ohralik* one of the clients actually may have invited the solicitation. Ohralik appears to have seen the parents of the client first and may have been invited by the parents to call on the 18-year old client in the hospital. Therefore, *Ohralik* may be read to permit state prohibition of an *invited* verbal face-to-face solicitation. However, the Florida Statute and the Rule of the Florida State Board of Accountancy before this Court prohibit only uninvited communication and therefore the right of the State to prohibit invited verbal solicitation is not here raised.

on what was said and such matters as the intonation of the speaker. There is no practical way to "freeze" the speech unless the speaker tapes the entire conversation and preserves the tape for a defined period.[11/]

(v) The result of this set of rules is that the licensed professional may make an uninvited solicitation in writing, subject to whatever legitimate controls over format and retention the state regulator may establish, but that licensed professional may be prohibited by the state from uninvited verbal face-to-face solicitation.[12/] The

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[11/] But in Ohralik's case, he did tape at least two of his conversations and he did preserve the tape (although he appears to have done so largely to prove the existence of a contingent fee contract with the client), and this Court ignored that fact in reaching its decision that Ohralik could be punished by the regulator for making the verbal solicitation. One difficulty of any such "freeze" rule is reflected in *Ohralik* itself, that of ensuring that *all* the conversation is on tape. One of the clients in *Ohralik* disputed that the entire conversation had been taped.

[12/] The State's perception of the potential for harm in circumstances such as those presented in this case is well founded. The detrimental aspects of face--to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under
(continued...)

> State may exercise this right of prohibition because it believes that form of solicitation is inherently unprofessional or because it believes it simply can not effectively regulate it after-the-fact.

Some of the evils noted in *Ohralik*, 436 U.S. at 461, that can be ameliorated by the prevention of direct, in-person, uninvited solicitation are not applicable to the practice of public accountancy--such as the chasing of ambulances. Others however, such as the assertion of fraudulent claims, the debasing of the profession and potential harm to the client or the public involved in overreaching, overcharging, underrepresentation or misrepresentation, all are powerful and compelling arguments in favor of prohibiting such forms of solicitation in public accountancy.

[12/](...continued)

> circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the state to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited. [Footnotes omitted]

Ohralik, supra at 436 U.S. 464-66, 98 S.Ct. 1923-24, 56 L.Ed.2d 459-60.

In light of the foregoing, what would be the fate of Florida's regulation if this Court were to limit *Ohralik* to specific types of uninvited face-to-face solicitation, based on the factual likelihood of it being misleading or overbearing, or on the condition of the person solicited, such as the 18-year-old females recently traumatized, one of whom was still in the hospital? The application of *Ohralik* to the funeral director may fit into this kind of context. Obviously, the CPA would only rarely do so, although anyone who has to see an auditor or investigator from the Internal Revenue Service may deem himself or herself in a traumatic state.

If a justification is required for the prohibition of uninvited face-to-face solicitation, what is that justification? The CPA may perform a variety of functions, but clearly the most significant are the "attest" function and the tax function.[13/]

[13/] The Court in *Ohralik* found that a lawyer who engages in personal solicitation may be more inclined to subordinate his client's best interest to his own pecuniary interest. The Court also held that "[t]hese lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest." 436 U.S. at 461. Such a concern is inherent in the public accountancy profession as well. A CPA soliciting a client for a tax engagement wherein he will act as an advocate on behalf of the client acts in a manner similar to that of an attorney pressing a client's claim in court.

In the practice of public accountancy, the same "special problems of conflict of interest" arise if a CPA is involved in soliciting an audit client. Although it may be less likely that a potential audit client will be seduced or intimidated into hiring a CPA as a result of an in-person solicitation, the potential for collusion is very real, and it is in the public's perception of a CPA as an independent outside observer and an opiner on the truth and

(continued...)

The Attest Function

American business and the American public depend on satisfactory performance by CPAs of the so-called "attest" function, in which the CPA "attests" that the financial statements of a business are prepared in accordance with generally accepted accounting principles ("GAAP"). To do this, the CPA must be "independent" of the business which is audited, a term defined in essentially the same fashion by the Florida State Board of Accountancy[14] and the United States Securities and Exchange Commission.[15] Only certified public accountants can perform this function and its importance has been recognized by this Court.

In *U.S. v. Arthur Young & Co., supra*, at 465 U.S. 817-18, 104 S.Ct. 1503 (prohibiting CPAs from retaining certain records because of the necessity of preserving actual and perceived independence) the Court described the function and importance of a CPA performing the attest function:

> An independent certified public accountant performs a different role [than an advocate or confidential advisor]. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations. [Emphasis original.]

That the State, which regulates the licensed professional who performs this very significant function, would wish to police in an effective manner an uninvited solicitation to establish the

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[12](...continued)
accuracy of financial statements which justifies the profession's licensure. *See Florida Accountants Ass'n v. Dandelake*, 98 So.2d 323 (Fla. 1957). This protection of the public's perception of a CPA as being independent is singular justification for prohibiting a form of soliciting employment that this Court has found may "create special problems of conflict of interest." Other activities of a CPA are also regulated and the rule on solicitation is an integral part of this larger overall regulatory scheme. Any CPA is subject to the disciplinary provisions of Sections 473.322 and 473.323, Fla. Stat., whether he is performing the attest function or merely using his accounting skills in the preparation of tax returns or acting as a financial advisor. Also, activities of a CPA are subject to a partial prohibition on contingent fees (Section 473.319, Florida Statutes) and the taking of commissions (Section 473.3205, Fla. Stat.). All of these regulations apply to all activities of CPAs which involve the use of their accounting skills, and are evidence that the intent of the Florida Legislature is to protect the integrity and objectivity of CPAs in all their endeavors.

[14] Rule 21A-21.001, F.A.C.

[15] *See* Section 601, Codification of Financial Reporting Policies, *Fed. Sec. L. Rep. (CCH)*, ¶ 73, 251.

"attest" function relationship seems simple common sense.[16] For the State to make the decision that the relationship, when initiated at the instance of the licensed professional, should be in writing rather than verbal is certainly reasonable. To suggest that the State should be limited to an after-the-fact determination, initiated almost certainly on complaint of who said what to whom, when and in what tone is nonsensical, and if the First Amendment compels it, then the First Amendment compels a nonsensical result.

The Tax Function

CPAs are not the only persons who perform the tax function, that is, the preparation of tax returns and the appearance before the Internal Revenue Service on behalf of a taxpayer. So do attorneys and so do enrolled agents, who are persons whom the Internal Revenue Service specifically enrolls after evaluation of their credentials and ability to perform the tax function (not necessarily attorneys or CPAs). The fact that some States do not prohibit direct, in-person, uninvited solicitation by CPAs does not invalidate the judgments of the States that do prohibit such solicitation. When acting as "laboratories of democracy," the

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[16] As noted by this Court in *Arthur Young, supra*, CPAs in many circumstances have duties not only to their clients, but also to the public which relies upon the integrity and impartiality of a CPA's opinion. In this sense, a CPA is similar to an attorney, who functions as an "officer of the court." Just as an attorney, a CPA may be a self-employed businessman; however, just as an attorney "acts as a trusted agent of his client and as an assistant to the court in search of an appropriate solution to disputes," so too does a CPA act as an "umpire" in many of his engagements, especially when announcing an impartial ruling as to the accuracy of a client's financial statement. *See Ohralik, supra*, at 436 U.S. 460, 98 S.Ct. 1920, 56 L.Ed.2d 456.

various States are entitled to "broad latitude" in exercising their traditional power to regulate learned professions and to protect the public and the profession from abuses. *See Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. at 2297-98 (O'Conner, J., dissenting).[17]

States are permitted by *Ohralik* to prohibit uninvited face-to-face solicitation of clients by attorneys for the performance of any aspect of the tax function. There is no possible reason for States *not* to be permitted to make the same prohibition of CPAs. In fact, the rules of the Internal Revenue Service prohibit *all* uninvited solicitation, whether written or verbal, of clients for performance of the tax function.[18]

Other Functions

Concededly, CPAs perform functions other than the "attest" function and the tax function. Accountants may engage in various types of consulting activities. Assuming the State must justify its prohibition of uninvited face-to-face solicitation, what justification is there for prohibiting such solicitation of services other than the "attest" and tax functions? The justification is simple: direct, verbal solicitation is unregulatable because the regulator cannot know what was in fact said, or the tone and

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[17] Interestingly, the Internal Revenue Service, in considering amendments to its rules in light of this Court's decisions in *Zauderer, supra*, *Peel, supra*, and *Shapero, supra*, deleted the term "certified" before enrolled agent, believing that the term could be confused with the much more extensive certification process required of CPAs.

[18] This, of course, goes further than the Florida rules and regulations here at issue, because the Florida rules permit uninvited written solicitation.

manner in which the statement was delivered. Because the regulator does not know what was said, he cannot know what particular function formed the basis for the solicitation. Certainly the regulator need not so minutely parse the justification for its regulations.

Similarly, the State's interest in preventing harm before it occurs justifies the imposition of a prophylactic rule against direct, in-person, uninvited solicitation for pecuniary gain on the part of CPAs. Only by preventing such contacts before they occur can the state prevent fraud, overreaching or misrepresentation (more likely when a CPA is engaged in tax representation, financial or management advisory services), or decrease the likelihood of conflicts of interest (more likely when a CPA solicits a client in an effort to obtain an engagement to perform an independent audit or other attest function). In any event, whether the governmental interest being served is the prevention of consumer fraud by CPAs seeking new tax clients, or the maintenance of the reality and perception of CPAs acting as independent, impartial analysts of a business entity's financial statements, a prophylactic rule banning direct, in-person, uninvited solicitation directly advances vital societal concerns.[19]

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[19] Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as 'a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.' *Zauderer, supra*, at 471 U.S. 641, 105 S.Ct. at 2277. *See Ohralik, supra*, at 436 U.S. 457-58, 464-65, 98 S.Ct. at 1919-20, 1922-23.

(continued...)

Ohralik, supra, *Zauderer, supra* and *Shapero, supra*, make it crystal clear that the State's ability to ban the solicitation at issue in the instant case as a result of the inherent inability to regulate such solicitation and the profound potential for abuse outweigh the CPA's interest in the potential employment that may be gained through cold-call verbal solicitation. The prohibition is appropriate notwithstanding the type of engagement sought, the degree of sophistication, business acumen, education or knowledge of the potential client, or even the good faith and honest effort of the vast majority of practitioners.[20]

II. The State's Ban On Verbal Cold-Call Solicitation Is A Reasonable Restriction Upon The Commercial Expression of CPAs, And Is Not Facially Unconstitutional.

Fane's Complaint is a direct facial attack upon a rule that impacts upon commercial expression. The Board, however, has not applied the Rule herein to any specific activities of Fane, and his standing is established only insofar as he is a Florida-licensed CPA who is governed by the Rule and who desires to engage in solicitation to expand his tax and management advisory services practice. (JA-9-11). *See Board of Airport Comm'rs of Los Angeles*

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[19](...continued)
Shapero, supra, at 486 U.S. 475, 108 S.Ct. 1922, 100 L.Ed.2d 485.

[20] "The relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Shapero, supra*, at 486 U.S. 474, 108 S.Ct. 1922, 100 L.Ed.2d 485.

v. Jews for Jesus, Inc., 482 U.S. 569, 574, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500, 507 (1987).

Fane's facial challenge asserts the Rule is "invalid *in toto*--and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505, 523 (1974). When evaluating a facial challenge to a state law or regulation, the Court must consider any limiting construction that a State or local enforcement agency has proffered. *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222, 228 (1972).[21/] As the Court noted in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 369 (1982):

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The Court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. (Footnotes omitted).

The Court has rejected challenges to restrictions on commercial speech on grounds of the overbreadth doctrine. As noted in *Bates v. State Bar of Arizona*, 433 U.S. 350, 380, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810, 834 (1977), "the justification of the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." *See San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 538, 107 S.Ct. 2971, 2981, 97 L.Ed.2d 427, 448 (1987).

There is no evidence or assertion here that the Rule impacts noncommercial speech at all, so as to justify the imposition of the overbreadth doctrine to its terms. Similarly, there is no assertion the Board ever construed the Rule in such a manner so as to limit noncommercial speech in violation of the analysis set forth in *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978).[22/] As such, there is no "realistic danger that the statute itself will significantly compromise recognized First Amendment

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[21/] In *State Department of Professional Regulation, Board of Accountancy v. Rampell*, 589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, No. 79,371 (Supreme Court of Florida, February 17, 1992), a state appellate court upheld the Rule against a facial attack on its constitutionality under the First Amendment to the United States Constitution. *See Rampell* at 1353-58. At the same time, the appellate court invalidated a state statute prohibiting competitive bids by CPAs on attest engagements. *Id.* at 1358-60. The Board has appealed to the Florida Supreme Court the lower court finding that the competitive bidding statute was unconstitutional. The CPA who challenged the Rule has also sought review of that decision by the Florida Supreme Court. Under the Florida Rules of Appellate Procedure, however, the Florida Supreme Court exercises discretionary authority to review orders of appellate courts declaring a state statute or rule to be constitutional. *See* Rule 9.030(a)(2)(A)(i), Fla. R. App. P., as opposed to appeals of decisions of appellate courts declaring statutes unconstitutional where there is an appeal of right. *See* Rule 9.030(a)(1)(A)(ii), Fla. R. App. P.

[22/] Section 473.323(1)(l), Fla. Stat. (the statutory authority for the rule) limits its application so as not to impact expression "to the extent that such solicitation constitutes the exercise of constitutionally protected speech."

protection of parties not before the Court." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 784 (1984). Fane cannot complain of such here, nor, in light of his obvious desire to engage in conduct which is clearly within the parameters of the Rule, can he claim the Rule is vague.

This Court has adopted a four-prong test in its general analysis of the constitutionality of governmental restrictions on commercial speech, whether or not such restrictions involve licensed professionals. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341, 351 (1980). First, the speech at issue must involve a lawful activity and not be false, fraudulent, deceptive or misleading. Second, the restriction on commercial speech must serve a substantial governmental interest. Third, the regulation must directly advance the asserted governmental interest. Fourth, the regulation must be no more extensive than necessary to achieve the government's interest.[23] The Board's Rule fits

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[23] The fourth prong of the Central Hudson test does not involve a requirement that the regulation be the "least restrictive means" necessary to achieve the governmental interest asserted. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Court specifically rejected any requirement which would mandate that the governmental regulation be the least restrictive regulation possible, and determined that there must be a "reasonable fit" between the government's asserted purpose and the means by which the government chooses to accomplish that purpose. The Court held that if the State makes a reasonable effort to differentiate harmless from harmful commercial speech, then the regulation will be sustained if the regulation's impact is in reasonable proportion to the interest asserted. *Id.*, at 492 U.S. 476-78, 109 S.Ct. 3033-35, 106 L.Ed.2d 401-02.

squarely within the parameters of the four-prong test.

In this case, the Board does not assert that all CPA solicitation of potential clients is either illegal or necessarily misleading. The State and the Board already permit multimedia advertising as well as various forms of solicitation of clients as set forth in the rules governing the practice of public accountancy in the State. See Rule 21A-24.001, F.A.C. Direct, in-person, uninvited solicitation, however, is without doubt a mode of communication wherein the potential for harm is well founded.[24]

As discussed, the State, along with the United States Department of Treasury, realize the problems associated with direct, in-person, uninvited solicitation by CPAs, and have found such solicitation to be inappropriate.[25] In the rules governing

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[24] Direct, in-person solicitation is a practice "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." *Zauderer v. Office of Disciplinary Counsel, supra*, 471 U.S. at 641, 105 S.Ct. at 2277, 85 L.Ed.2d at 666, citing *Ohralik, supra*, 436 U.S. at 464-65, 98 S.Ct. at 1922-23, 56 L.Ed.2d at 458-59. "Face to face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation . . . . The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase . . . ." *International Society for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992).

[25] By statute, Georgia, (Ga. Code Ann. § 43-3-35(i), (1988) and Texas (Tex. Rev. Civ. Stat. Ann. art. 41A-1, § 6(a)(2), (1991) (allegation of restraints on advertising and solicitation of violating antitrust law dismissed on grounds that state legislature had (continued...)

practice before the Internal Revenue Service, the Director of Practice has specifically included CPAs as among those qualified practitioners for whom such solicitation is banned. *See* 31 C.F.R. § 10.30.[26/]

> No attorney, certified public accountant, enrolled agent or other individual eligible to practice before the Internal Revenue Service shall make, directly or indirectly, an uninvited solicitation of employment, in matters related to the Internal Revenue Service. Solicitation includes, but is not limited to, in-person contacts, telephone communications, and personal mailings directed to the specific circumstances unique to the recipient. This restriction does not apply to: (i) Seeking new business from an existing or former client in a related matter; (ii) solicitation by mailings, the contents of which are designed for the general public; or (iii) noncoercive in-person solicitation by those eligible to practice before the Internal Revenue Service while acting as an employee, member, or officer of an exempt organization listed in Sections 501(c)(3) or (4)8 of the Internal Revenue Code of 1954 (26.U.S.C.).

[25/](...continued)
approved the restraints), prohibit such solicitation. Several other states prohibit such in-person solicitation by rule, as noted by the Eleventh Circuit Court of Appeals in *Fane v. Edenfield, supra*, 945 F.2d at 1514.

[26/] The Department of the Treasury has proposed amendments to its rules governing advertising and solicitation of those practicing before the Internal Revenue Service. *See* 56 Fed. Reg. 16, 289-91 (1991); however, these modifications address advertising and do not include any change in the ban on direct, in-person, uninvited solicitation *after* the Department reviewed this Court's pronouncements on in-person solicitation bans.

With respect to the second prong of the Central Hudson test, it is unquestioned that States have a legitimate and overriding interest under the police power in regulating the practice of public accountancy. See *Heller v. Abess*, 184 So. 122 (Fla. 1938), *Mercer v. Hemmings*, 170 So.2d 33 (Fla. 1964), *U.S. v. Arthur Young & Co., supra*, 465 U.S. at 817, 104 S.Ct. at 1503, 79 L.Ed.2d at 836.

As discussed, the State is directly concerned with the perception as well as the reality of CPAs gaining clients by a manner of solicitation which is inherently unregulatable, and which lessens the public's perception of the CPA as an independent arbiter of the legitimacy of a business entity's financial statements. Similarly, when a CPA acts as an advocate on behalf of the client, as in matters before the Internal Revenue Service and various other state and federal taxing authorities, there is an obvious concern that not only will the professionalism of the CPA be called into question, but also that acts of fraud or overreaching are likely to occur when the CPA solicits an unsuspecting consumer.[27/]

[27/] The Board draws the Court's attention to "A Report on the Special Committee on Solicitation by the American Institute of Certified Public Accountants" and "A Survey on Prohibitions on Advertising and Solicitation Prepared for the American Institute of Certified Public Accountants." The "Special Committee referred to in the "Report" was commissioned by the AICPA in 1979-81 to review the AICPA's ban on *all* forms of direct solicitation of clients by CPAs. See Rule 502 AICPA Code of Professional Ethics (1980) (JA-45). The Special Committee's report led to the AICPA's rescinding its prohibition on such solicitation in 1981. (*See* Affidavit of Dooner). (JA-20-21).

The "Survey," however, addressed other forms of solicitation on the part of CPAs in addition to the direct, in-person, (continued...)

In any event, the State's asserted governmental interest in regulating a learned profession includes not only the prevention of abuses on the part of CPAs, but also the maintenance of true professionalism among CPAs practicing their profession. The Rule thus meets the second prong of the Central Hudson test.

The prohibition of direct, in-person, uninvited solicitation by CPAs of potential clients directly advances the State's interests in the protection of clients and the public from improper, unregulated actions on the part of CPAs engaged in such solicitation, as well as the maintenance of "CPAs' true professionalism" and high standards of independence and integrity.[28] The Rule thus meets the third prong of the Central

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[27](...continued)
uninvited solicitation complained of here and shows the ambivalence of the CPA profession as to its decision to remove the ban. (JA-55-56). Nearly two-thirds of the CPAs responding to the "Survey" had grave difficulties with uninvited solicitation in any form. The membership of the AICPA strongly agreed with the concept that "solicitation causes unsophisticated people to make decisions about CPA services that are not based upon their own objective choice" and that such solicitation will "reduce the public's expectation of the quality of CPA services." (JA-58).

Based primarily on antitrust concerns, however (*see National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978)), the AICPA voided its ban on direct, uninvited solicitation in 1981. (JA-34-35). *See also* Affidavit of Dooner. (JA-20-21).

[28] While the primary basis for the regulation is rooted in the protection of the professional standards of CPAs, and in the impracticability of other forms of regulation, it is clear that the State has an interest in protecting any potential client of a CPA from overreaching, undue influence or vexatious conduct during a (continued...)

Hudson test.

Finally, as previously discussed, the Rule prohibits only direct in-person solicitation; any other alternative forms of nonfraudulent solicitation are available to those who wish to solicit new clients. The Rule thus complies with the fourth prong of the Central Hudson test.

III. The State's Ban On Verbal Cold-Call Solicitation By CPAs Is A Reasonable Time, Place And Manner Regulation Of A Form Of Commercial Speech.

Rule 21A-24.002, F.A.C., is a reasonable time, place and manner regulation of a form of commercial expression that is within the legitimate power of a state government. The Rule serves a substantial governmental interest, is content neutral, and

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[28](...continued)
solicitation. *See Ohralik, supra*. Thus the State's interest in protecting the privacy of potential CPA clients extends even to those solicitations where the CPA attempts to obtain business in professional activities other than the attest function, e.g., tax preparation or financial advice. The protection of one's right to privacy from certain modes of solicitation where vexatious conduct can occur and is inherently unregulatable, such as direct, in-person, uninvited solicitation, has long been recognized as a valid basis upon which solicitation may be regulated, *see National Funeral Services, Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989); *Guardian Plans, Inc. v. Teague*, 870 F.2d 123 (4th Cir. 1989) (upholding rules prohibiting "at-need" solicitation of potential clients by funeral directors); *International Society for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992) (upholding rules prohibiting solicitation in airports). This justification was cited at length by the Florida Fourth District Court of Appeal in its Opinion upholding the Rule at issue here in *Rampell, supra*, at 1357.

leaves open ample alternative means of communication with potential clients. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346, 364 (1976).

All activities protected by the First Amendment, whether commercial or noncommercial in nature, have traditionally been subject to legitimate time, place and manner restrictions. The Court has accorded such regulations greater deference than regulations of speech aimed at the content of the speech. *Perry Educational Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). At one time, the Court intimated that time, place or manner restrictions and the test for evaluating such restrictions on expression might be limited to activities that take place only on public property and that reach the status of a public forum. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989). The Court has now, however, clearly enunciated that time, place and manner restrictions on expression can be applied to the private sector as well. *See Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504, 511 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Court, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), opined that the test to be used in determining whether a regulation is a valid time, place or manner restriction of expression protected by the First Amendment is set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968):

> This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental

> interest in regulating the 'nonspeech' element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imposition inheres in these terms, we think it is clear that the government regulation is sufficiently justified, if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [Footnotes omitted.]

O'Brien, supra, at 391 U.S. 376-77, 88 S.Ct. 1678-79, 20 L.Ed.2d 672.

Florida's Rule prohibiting direct, in-person, uninvited solicitation by CPAs meets the O'Brien test. As discussed, it is unquestioned that a state may constitutionally regulate conduct by members of the licensed professions. *See Ohralik, supra*, at 436 U.S. 460, 98 S.Ct. 1920-21, 56 L.Ed.2d 456. Furthermore, the State has a legitimate interest in preserving the actual and perceived independence and integrity of CPAs and in protecting the public from dishonest or incompetent practitioners. *See United States v. Arthur Young & Co., supra*, 465 U.S. at 811-21, 104 S.Ct. at 1499-1504, 79 L.Ed.2d at 832-38.[22]

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[22] "It is therefore not enough that financial statements *be* accurate; the public must also *perceive* them as being accurate. Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an (continued...)

The third prong of the O'Brien test requires the interest served by the regulation to be justified without reference to the content of the regulated speech. *See City of Renton, supra*, at 475 U.S. 48, 106 S.Ct. 929, 89 L.Ed.2d 38. It is fundamental that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal, merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834, 843 (1949).

Valid time, place and manner restrictions can be *directed* toward expression involving a particular topic without being deemed impermissible.[20] Thus, in *City of Renton, supra*, and *Barnes v. Glen Theatre, supra*, the Court upheld regulations which impacted particular forms of expression because the regulations were aimed at the secondary effects of the expression on either the public morals (*Barnes, supra*) or the public safety of the

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[20](...continued)
independent professional." [Emphasis original.] See *Arthur Young, supra*, at 465 U.S. 819, 104 S.Ct. 1504, 79 L.Ed.2d 837.

[21] As noted by Justice Stevens, "any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment, knows that it is incorrect to state that a 'time, place or manner restriction' may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 544-45, 100 S.Ct. 2326, 2337-38, 65 L.Ed.2d 319, 333 (1980), (Stevens, J., concurring).

surrounding community (*City of Renton, supra*).[22]

Direct, in-person, uninvited solicitation offers special dangers[23] that cannot be effectively controlled through any other "less onerous forms of regulation" than absolute prohibition.[24]

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[22] The Eleventh Circuit Court of Appeals erred in rejecting Petitioners' assertion that the regulation is a legitimate time, place and manner restriction. Initially, the Court of Appeals erred in implying that a time, place and manner restriction cannot ban a particular form of expression. *Barnes, supra*, involves just such an unqualified ban on nude public dancing and was upheld by this Court. Secondly, the Court of Appeals' rejection of the Board's position because the regulation is a "speaker specific, unqualified ban on a category of expressive activity" and thus, is *per se* objectionable, is simply incorrect. The regulation is not addressed to commercial speech itself, but rather upon a particular *manner* of expressing that speech. The appropriate inquiry, therefore, is whether or not the State has advanced non-content based reasons for banning the particular mode of solicitation prohibited by the rule in question.

[23] *City of Renton, supra*, at 475 U.S. 51-52, 106 S.Ct. 931, 89 L.Ed.2d 40, requires that the body enacting a regulation have a reasonable basis to believe that the harm to be protected against actually exists. It is not required that new studies be embarked upon or evidence be produced independently as long as the evidence relied upon is reasonably relevant to the problem addressed. The State here need look only to the findings of this Court in *Ohralik* and the results of the "Survey" conducted by the AICPA to justify enactment of the regulation at issue herein.

[24] In *Metromedia, supra*, at 453 U.S. 515-16, 101 S.Ct. 2897, 69 L.Ed.2d 819-20, the plurality rejected a theory that the regulation affecting certain billboard advertising could be characterized as a time, place and manner restriction in its prohibition of noncommercial billboards. The Court stated that "the ordinance does not generally ban billboard advertising as an
(continued...)

See Zauderer v. Office of Disciplinary Counsel, supra, at 471 U.S. 641-42, 105 S.Ct. 2277, 85 L.Ed.2d 666 (1985) (O'Connor, J., dissenting). As was noted by Judge Edmondson in his dissent below, *Fane v. Edenfield, supra*, 945 F.2d at 1520, the sales pitches offered by attorneys when engaged in direct, in-person solicitation are clearly analogous to those which could be offered by CPAs. In both contexts, a highly trained professional has the ability to overwhelm the unwary and unlearned consumer.

This is especially true when CPAs, such as Fane, are primarily concerned with a tax practice. It would hardly be a shock to this Court to note, given the complexities of the various state and federal income tax rules, statutes and regulations, that a CPA trained in their application may well be in a similar position to that of an attorney "ambulance chasing" to find a potential personal injury client. In both circumstances the potential client is likely to be at his or her wit's end and ready to listen to any voice of approval or perceived authority. The Department of the Treasury recognized these possibilities for vexatious conduct in rejecting any amendment to its rule prohibiting in-person solicitation by practitioners before the Internal Revenue Service after *Ohralik, supra*, was decided. *See* 44 Fed. Reg. 4, 940-41 (1979).

Cold calls are unlike advertisements, which can be

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[22](...continued)
unacceptable manner of communicating information or ideas; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times." As to the instant rule, direct, in-person uninvited commercial solicitation by CPAs is "banned everywhere and at all times" and therefore does not distinguish between permissible and impermissible commercial solicitation based on content.

effectively reviewed and monitored through means less onerous than an absolute prohibition. In *Bates, supra*, this Court found an outright ban on all lawyer advertisements to be unconstitutional, given the less onerous means reasonably available to review written or electronic expressions of commercial speech. The Court noted a state's asserted desire to ban all lawyer advertising implicated *control* of the speech itself rather than the protecting of the public from overbearing lawyers seeking work. In *Ohralik*, however, as in the instant case, the state's concern was based upon the *mode* of communication, not the communication itself.[23] The inability to ascertain what may have been said during an uninvited telephone contact results in a vitiation of the state's ability to police fraudulent, coercive, or in the case of audit engagements, collusive acts of soliciting CPAs. Such a specter of helplessness on the part of the licensing authority, when confronted with issues that go to the core of the accounting profession's integrity and objectivity, can only result in the diminution of the profession's standing in the eyes of the public and a lessening of ethical standards. Banning the *manner* of solicitation is justified here where the State has no reasonable ability of reviewing the content of such regulation.

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[23] *Metromedia, supra*, states at 453 U.S. 501, 101 S.Ct. 2889, 69 L.Ed.2d 810-11:

> Even a cursory reading . . . reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark in *Kovacs v. Cooper*, 336 U.S. 77, 97, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949): Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. [Footnote omitted.]

In *Ohralik, supra*, at 436 U.S. 457, 98 S.Ct. 1919, 56 L.Ed. 2d 454, the Court permitted the state to ban just such direct, in-person, uninvited solicitations as those at issue here, when practiced by attorneys, because of the special dangers presented by such a mode of commercial communication. The Court did not subject the regulation in question to the heightened scrutiny required for content-based prohibitions. Instead, the Court held that the regulation prohibiting direct, in-person solicitation required less scrutiny than a content-based regulation:

> In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia State Board of Pharmacy*, it lowers the level of appropriate judicial scrutiny.

Ohralik, supra, at 436 U.S. 457, 98 S.Ct. 1919-20, 56 L.Ed. 454.

Indeed, it is difficult to analyze *Bates, supra*, and *Ohralik, supra*, other than by ascertaining that the Court determined that the distinction in the *mode of communication* at issue in the two cases was the deciding factor.[35] In *Bates*, the State unconstitutionally sought to ban lawyer solicitation of potential clients through the various print and electronic advertising media. In *Ohralik*, the State simply banned direct, in-person solicitation of potential

[35] "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Shapero, supra*, at 486 U.S. 475, 108 S.Ct. 1922, 100 L.Ed.2d 485.

clients.[36] Both forms of solicitation were aimed at seeking prospective clients, and both sets of regulations banned that activity. When the states are involved in regulating learned professions, a rule can be accepted as a valid time, place and manner restriction if the justification for the restriction deals with the maintenance of "true professionalism" coupled with the impossibility of meaningful regulation by any other means. Such circumstances justify a prophylactic ban on certain modes of expression as long as ample alternative methods of communication remain open. *See Barnes, supra*, at __ U.S. __, 111 S.Ct. 2461-63, 115 L.Ed.2d 512, 514; *Metromedia, supra*, at 453 U.S. 508-09, 101 S.Ct. 2892-93, 69 L.Ed.2d 815; *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

As the final prong of the O'Brien test requires, there is no question that alternative channels of communication remain open under the Rule. The Rule prohibits only direct, in-person, uninvited solicitation. All other forms of solicitation or advertising by CPAs are permitted as long as they are not false, fraudulent, deceptive or misleading. *See* Rule 21A-24.001, F.A.C., and Section 473.323(1)(f), Fla. Stat. Indeed in *Ohralik, supra*, and *Shapero, supra*, the Court recognized the legitimacy of prohibiting direct, in-person, uninvited solicitation of potential clients for remuneration, as long as other forms of communication remain open.

The State's Rule prohibiting direct, in-person, uninvited

[36] The Court recognized in the *Ohralik* companion case of *In re Primus, supra*, that direct solicitation of non-remunerative clients was essentially noncommercial speech and the public interest could not justify a prophylactic ban where the impact on the state's interest in maintaining professional standards was much less persuasive.

solicitation passes constitutional muster. Whether the Rule is justified because of the secondary effects of such unchecked solicitation upon the State's regulatory scheme for the public accountancy profession,[37] or as a reasonable regulation based upon traditional State authority in regulating learned professions,[38] or as a compelling State interest,[39] the Rule meets applicable First Amendment constraints and is a legitimate and necessary part of a general State scheme for the regulation of the public accountancy profession.

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[37] *See City of Renton, supra*, at 475 U.S. 50-51, 106 S.Ct. 925, 89 L.Ed.2d 29; *Barnes, supra*, at ___ U.S. ___, 111 S.Ct. 2468, 115 L.Ed.2d 521, (Souter, J., concurring).

[38] See *Barnes, supra*, at ___ U.S. ___, 111 S.Ct. 2463, 115 L.Ed.2d 515 (Scalia, J., concurring).

[39] *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

CONCLUSION

For the foregoing reasons, the decisions of the Court of Appeals and the District Court should be reversed, and judgment should be entered in favor of Petitioners Fred H. Edenfield, et al., upholding the constitutionality of Petitioners' Rule prohibiting direct, in-person uninvited solicitation of potential clients by CPAs.

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NO. 91-1594

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

FRED H. EDENFIELD, et al., Petitioners,

v.

SCOTT FANE, Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX

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U.S. CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

14th Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA RULES OF APPELLATE PROCEDURE
(Fla. R. App. P.)

Rule 9.030 JURISDICTION OF COURTS

(a) Jurisdiction of Supreme Court.

(1) *Appeal Jurisdiction.*

(A) The Supreme Court shall review, by appeal:

(i) final orders of courts imposing sentences of death;

(ii) decisions of district courts of appeal declaring invalid a state statute or provision of the state constitution.

(B) When provided by general law, the Supreme Court shall review;

(i) by appeal final orders entered in proceedings for the

(ii) action of statewide agencies relating to rates or services of utilities providing electric, gas or telephone service

(2) *Discretionary Jurisdiction.*

(A) decisions of district courts of appeal that:

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which

the appeal is pending to require immediate resolution by the Supreme Court, and:

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

CODE OF FEDERAL REGULATIONS
31 CFR Subtitle A (7-1-91 Edition)

§ 10.30 Solicitation.

(a) *Advertising and solicitation restrictions.* (1) No attorney, certified public accountant, enrolled agent, or other individual eligible to practice before the Internal Revenue Service shall, with respect to any Internal Revenue Service matter, in any way use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, unduly influencing, coercive or unfair statement or claim. For the purposes of this subsection, the prohibition includes, but is not limited to, statements pertaining to the quality of services rendered unless subject to factual verification, claims of specialized expertise not authorized by State or Federal agencies having jurisdiction over the practitioner, and statements or suggestions that the ingenuity and/or prior record of a representative rather than the merit of the matter are principal factors likely to determine the result of the matter.

(2) No attorney, certified public accountant, enrolled agent or other individual eligible to practice before the Internal Revenue Service shall make, directly or indirectly, an uninvited solicitation of employment, in matters related to the Internal Revenue Service. Solicitation includes, but is not limited to, in-person contacts, telephone communications, and personal mailings directed to the specific circumstances unique to the recipient. This restriction does not apply to: (i) Seeking new business

from an existing or former client in a related matter; (ii) solicitation by mailings, the contents of which are designed for the general public; or (iii) non-coercive in-person solicitation by those eligible to practice before the Internal Revenue Service while acting as an employee, member, or officer of an exempt organization listed in sections 501(c)(3) or (4) of the Internal Revenue Code of 1954 (26 U.S.C.).

(b) *Permissible advertising.* (1) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service, may publish, broadcast, or use in a dignified manner through any means of communication set forth in paragraph (d) of this section:

(i) The name, address, telephone number, and office hours of the practitioner or firm.

(ii) The names of individuals associated with the firm.

(iii) A factual description of the services offered.

(iv) Acceptable credit cards and other credit arrangements.

(v) Foreign language ability.

(vi) Membership in pertinent, professional organizations.

(vii) Pertinent professional licenses.

(viii) A statement that an individual's or firm's practice is limited to certain areas.

(ix) In the case of an enrolled agent, the phrase "enrolled to represent taxpayers before the Internal Revenue Service" or "enrolled to practice before the Internal Revenue Service."

(x) Other facts relevant to the selection of a practitioner in matters related to the Internal Revenue Service which are not prohibited by these regulations.

(2) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may use, to the extent they are consistent with the regulations in this section, customary biographical insertions in approved law lists and reputable professional journals and directories, as well as professional cards, letterheads and announcements: Provided, That: (i) Attorneys do not violate applicable standards of ethical conduct adopted by the American Bar Association, (ii) certified public accountants do not violate applicable standards of ethical conduct adopted by the American Institute of Certified Public Accountants, and (iii) enrolled agents do not violate applicable standards of ethical conduct adopted by either the National Society of Public Accountants or the National Association of Enrolled Agents.

(c) *Fee information.* (1) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may disseminate the following fee information:

(i) Fixed fees for specific routine services.

(ii) Hourly rates.

(iii) Range of fees for particular services.

(iv) Fee charged for an initial consultation.

(2) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may also publish the availability of a written schedule of fees.

(3) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service shall be bound to charge the hourly rate, the fixed fee for specific routine services, the range of fees for particular services, or the fee for an initial consultation published for a reasonable period of time, but no less than thirty days from the last publication of such hourly rate or fees.

(d) *Communications.* Communications, including fee information, shall be limited to professional lists, telephone directories, print media, permissible mailings as provided in these regulations, radio and television. In the case of radio and television broadcasting, the broadcast shall be pre-recorded and the practitioner shall retain a recording of the actual audio transmission.

(e) *Improper association.* An attorney, certified public accountant or enrolled agent may, in matters related to the Internal Revenue Service, employ or accept employment or assistance as an associate, correspondent, or sub-agent from, or share fees with, any person or entity who, to the knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section: Provided, That a practitioner does not, directly or indirectly, act or hold himself out as an Internal Revenue Service practitioner in connection with that relationship. Nothing herein shall prohibit an attorney, certified public accountant, or enrolled agent from practice before the Internal Revenue Service in a capacity other than that described above.

[44 FR 4943, Jan. 24, 1979]

FLORIDA STATUTES (Fla. Stat.)

473.301 Purpose.--The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

473.319 Contingent fees.--Public accounting services shall not be offered or rendered for a fee contingent upon the findings or results of such service. This section does not apply to services involving federal, state, or other taxes in which the findings are those of the tax authorities and not those of the licensee. Fees to be fixed by courts or other public authorities, which are of an indeterminate amount at the time a public accounting service is undertaken, shall not be regarded as contingent fees for purposes of this section.

473.3205 Commissions.--A licensee who is engaged in the practice of public accounting shall not pay a commission to obtain a client, nor shall he accept compensation for the sale of products, other than the work product of the licensee, or for referral of products or services of others. However, this section shall not prohibit:

(1) Payments for the purchase of an accounting practice;

(2) Retirement payments to individuals formerly engaged in the practice of public accounting or payments to their heirs or estates; or

(3) Payment of fees to a referring licensee for public accounting services to either the successor licensee or the client in connection with an engagement.

473.322 Prohibitions; penalties.–

(1) No person shall knowingly:

(a) Practice public accounting unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that such person holds an active license under this act, unless such person holds an active license under this act;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills. including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof for the purpose of obtaining a license;

(f) Use or attempt to use a public accounting license which has been suspended, revoked, or placed on inactive status;

(g) Employ unlicensed persons to practice public accounting; or

(h) Conceal information relative to violations of this act.

(2) Any person who violates any provision of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

473.323 Disciplinary proceedings.–

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provision of s. 473.317, s. 455.227(1), or any other provision of this act;

(b) Attempting to procure a license to practice public accounting by bribery or fraudulent misrepresentations;

(c) Having a license to practice public accounting revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of another state, territory, or country;

(d) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of public accounting or the ability to practice public accounting;

(e) Making or filing a report or record which the licensee knows to be false, willfully failing to file a report or record required by state or federal law, willfully impeding or obstructing such filing, or inducing another person to impede or obstruct such filing. Such reports or records shall include only those which are signed in the capacity of a certified public accountant;

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or chapter 455;

(i) Practicing on a revoked, suspended, or inactive license;

(j) Suspension or revocation of the right to practice before any state or federal agency;

(k) Performance of any fraudulent act while holding a license to practice public accounting; or

(l) Engaging in direct, in person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board.

(m) The failure by the licensee to maintain the good moral character requirement provided in s. 473.306.

(2) The board shall specify, by rule, what acts or omissions constitute a violation of subsection (1).

(3) When the board finds any licensee guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Denial of an application for licensure.

(b) Revocation or suspension of a license.

(c) Imposition of an administrative fine not to exceed $5,000 for each count or separate offense.

(d) Issuance of a reprimand.

(e) Placement of the licensee on probation for a period of time and subject to such conditions as the board may specify, including requiring the licensee to attend continuing education courses or to work under the supervision of another licensee.

(f) Restriction of the authorized scope of practice by the certified public accountant,

(4) The department shall reissue the license of a disciplined licensee upon certification by the board that the disciplined licensee has complied with all of the terms and conditions set forth in the final order.

FLORIDA ADMINISTRATIVE CODE (F.A.C.)

21A-21.001 Independence.

(1) A licensee shall not express an opinion on financial statements of an enterprise or on the reliability of an assertion by one party for use by another (third) party unless he and his firm are independent with respect to such enterprise or the party making the assertion. Independence will be considered to be impaired if, for example:

(a) During the period of his engagement, or at the time of expressing his opinion, he or his firm:

1. Had or was committed to acquire any direct financial interest or material indirect financial interest in the enterprise; or

2. Had any joint closely held business investment with the enterprise or any officer, director or principal stockholder thereof which was material in relation to his or his firm's net worth; or

3. Had any loan to or from the enterprise or any officer, director or principal stockholder thereof. The latter proscription does not apply to the following loans from a financial institution when made under normal lending procedures, terms and requirements:

a. Loans obtained by a certified public accountant or his firm which are not material in relation to the net worth of such borrower.

b. Home mortgages.

c. Other secured loans, except loans guaranteed by a certified public accountant's firm which are otherwise unsecured.

(b) During the period covered by the financial statements, during the period of the engagement, or at the time of expressing an opinion, he or his firm:

1. Was connected with the enterprise as a promoter, underwriter or voting trustee, a director or officer or in any capacity equivalent to that of a member of management or of an employee; or

2. Was a trustee of any trust or executor or administrator of any estate if such trust or estate had a direct or material indirect financial interest in the enterprise; or was a trustee for any pension or profit-sharing trust of the enterprise.

(c) The above examples are not intended to be all inclusive.

21A-24.001 Advertising.

(1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:

(a) Contains a misrepresentation of facts; or

(b) Makes only a partial disclosure of relevant facts; or

(c) Creates false or unjustified expectations of beneficial assistance; or

(d) Appeals primarily to a layperson's fears, ignorance, or anxieties regarding his state of financial well-being; or

(e) Contains any representation or claims, as to which the licensee, referred to in the advertising, does not expect to perform; or

(f) Contains any other representation, statement, or claim which misleads or deceives; or

(g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy unless he has in fact received such recognition and such recognizing agency is approved by the Board. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy the advertisement must state that the use of the term is a self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or

(h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," or "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of the Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or indirectly, of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead. *Specific Authority 473.304, 473.323, F.S. Law Implemented 473.323 F.S. History--New 12-4-79, Amended 2-3-81, 12-29-83, Formerly 21A-24.01, Amended 5-20-91.*

21A-24.002 Solicitation.

(1) A licensee may respond to any request for a proposal to provide public accounting services and may provide such services to those requesting same.

(2) A licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services: (a) if the communication would violate Rule 21 A-24.001 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication.

(3) For purposes of this rule, the term "direct, in-person, uninvited solicitation" shall be deemed and construed to mean any communication which directly or implicitly requests an immediate oral response from the recipient. Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited. Indirect forms of solicitation such as giving speeches, conducting educational seminars, distributing professional literature by mail or other forms of delivery that are not "in-person", writing books and articles, etc., are permitted.

(4) Any form of written communication to a potential client, invited or not, is permissible under this rule provided such communication conforms to the advertising guidelines of Rule 21 A-24.001. *Specific Authority 473.304, 473.323 F.S. Law Implemented 473.323 F.S. History--New 12-4-79, Amended 2-3-81, Formerly 21A-24.02.*

TEXAS STATUTES

Tex. Rev. Civ. Stat. Ann. Art. 41A-1,
Section 6(a)(2) (1991)

Rulemaking

Sec.6.(a) The board shall adopt rules deemed necessary or advisable to effectuate this Act, including the adoption of rules of professional conduct in order to establish and maintain high standards of competence and integrity in the practice of public accountancy and to ensure that the conduct and competitive practices of licensees serve the purposes of this Act and the best interest of the public. The board in its rules of professional conduct shall not restrict advertising or competitive bidding by licensees except if necessary to:

(2) Ensure that the conduct and dealings of licensees are free from fraud, undue influence, deception, intimidation, overreaching, harassment, and other forms of vexatious conduct, including uninvited solicitations to perform professional accounting services; provided, however, that the term "uninvited solicitations"

shall not be deemed to include advertising using mass media; or
....

GEORGIA STATUTES

Ga. Code Ann., Section 43-3-35(i) (1988)

(i) The board may by rule or regulation prohibit a licensee from soliciting by any direct personal communication an engagement to perform professional services. (Ga. L. 1908, p.86 § 1; Penal Code 1910, § 702; Code 1933, § 84-9902; Code 1933, § 84-213, enacted by Ga. L. 1935, p.85. § 13; Ga. L. 1943, p.363, § 5; Ga. L. 1968, p.1232, § 2; Code 1933, § 84-215, enacted by Ga. L. 1977, p.1063, § 1; Ga. L. 1983, p.559. § 15.)